STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

LAZ Parking LTD, LLC Petitioner, and COMMONWEALTH EDISON COMPANY Respondent.	)	Docket No 12-0324

POSITION STATEMENT OF LAZ PARKING LTD, LLC

In accordance with the Order of the Administrative Law Judge of March 15, 2016, LAZ Parking LTD, LLC ("LAZ") presents its position statement in the captioned Docket.

I. SUMMARY

The main issue in this case is straightforward: for transformer-rated meters that are used with large commercial and industrial customers like LAZ Parking, Commission Regulations require that certain accuracy testing steps be taken both before and shortly after the meter is installed. The reason for these requirements is self-evident, and even ComEd recognizes it: charges for electricity delivery and supply services for these large customers are among the highest in its service territory, and therefore accurate metering and billing is imperative. The checks of meter accuracy required under Part 410 are intended to prevent precisely the type of situation that arose in this case.

The Commission Regulations also embody an equitable allocation of risk. The utility has the burden of making the required tests. If it fails to perform those required tests, the sanction is that it may not back-bill the customer.

II. PROCEDURAL BACKGROUND

1. Prior to the Formal Complaint Proceeding

In June 2008, LAZ Parking entered into a Retail Electricity Supply Agreement (the "RESA") with MidAmerican Energy Company ("MidAm"), with service to commence with the Account's July 2008 meter read date. Pursuant to the RESA, LAZ Parking elected single billing under ComEd's Rider SBO, and accordingly MidAm included ComEd's delivery services charges in its bills to LAZ Parking.

Prior to the Account's July 2008 meter read date LAZ Parking took service from Pepco Energy Services, Inc. ("Pepco"). No single billing option was in effect under the Pepco supply arrangement, and accordingly the Account was billed by Pepco for supply service and separately by ComEd for delivery services.

On or about July 12, 2010, MidAm re-billed LAZ Parking $861,756.06 for alleged unbilled supply and delivery services said to have been incurred from the Account's August 2008 billing period through its May 2010 billing period. MidAm subsequently sent to LAZ Parking a re-bill breakout, which indicated that the amount of ComEd delivery services charges alleged to have been incurred during this period was $223,312.78.

In or about September 2010, LAZ Parking received a disconnect notice from ComEd that claimed that LAZ Parking owed ComEd $36,625.07 but contained no explanation of what the charge was for. On or about October 4, 2010, LAZ Parking made a payment of $36,625.07 to ComEd to avoid ComEd's threatened disconnection.

The total amount directly or indirectly paid by LAZ Parking to ComEd for alleged unbilled delivery services charges is $259,937.85.

Correspondence from ComEd dated October 28, 2010, a copy of which is attached as Exhibit D to the Formal Complaint, states that ComEd installed the meter 141362866 with an

incorrect meter constant.

2. Formal Complaint Proceeding

On May 2, 2012, LAZ Parking filed its complaint against ComEd to recover the approximately $259,938 back-billed to LAZ Parking by ComEd. This back-billing was wrongful because ComEd failed to comply with the accuracy and testing requirements set forth in the rules of the Illinois Commerce Commission (the "Commission"), and therefore ComEd's adjustment of its bills to LAZ Parking is unlawful under 83 Ill. Adm. Code Section 410.200(h)(1). The $36,627.07 was attributable to periods prior to the two-year recovery period provided under Commission Regulation 280.100.

LAZ Parking served ComEd with discovery in July 2012. LAZ Parking continued to have problems with ComEd's responses to discovery, and from August through October 2012, pursuant to S. Ct. Rule 201(k) and Commission Rule 200.350, LAZ Parking repeatedly requested ComEd to schedule a telephone conference to discuss these discovery issues. ComEd uniformly ignored all of these requests.

Due to ComEd's disregard of LAZ Parking's requests to address discovery issues, LAZ Parking served ComEd on October 5, 2012 with its First Set of Requests for Admission (the "Requests for Admission") pursuant to S. Ct. Rule 216.

B. ComEd's Rule 216 Admissions

On October 31, 2012, ComEd served on LAZ Parking its responses to the Requests for Admission. These responses failed to comply with the most fundamental requirements of S. Ct. Rule 216. None of ComEd's denials were made pursuant to a sworn statement as required by S. Ct. Rule 216, and ComEd's responses generally purported to combine both objections and denials. S. Ct. Rule 216(c) clearly and expressly provides that requests are deemed admitted unless within 28 days of service the party on whom the request to admit is served either admits the fact requested or provides a sworn statement denying specifically the matter of which admission is requested, or provides written objections on proper legal grounds.

The following facts are judicial admissions by ComEd pursuant to the Administrative Law Judge's ("ALJ") 2/13/2014 Order, at pgs. 4-5:

a. The amount claimed by ComEd in the Disconnection Notice of September 20, 2010 is $36,625.07.

b. ComEd calculated its alleged unbilled service amount from the June 2008 billing period through the May 2010 billing period for LAZ Parking's ComEd Account number 2931008045.

c. Meter Number 141362866 was programmed with an incorrect meter constant.

d. Prior to the date of the Disconnection Notice, ComEd had not notified LAZ Parking of the amount of any claim of ComEd for alleged unbilled service charges.

e. The total amount of ComEd's alleged unbilled delivery services charges from the Account's June 2008 billing period through the May 2010 billing period was $259,937.85.

f. ComEd tested Meter # 141362866 on October 25, 2007.

g. ComEd tested Meter # 141362866 on April 6, 2010.

h. ComEd did not discover that Meter #141362866 had been programmed with an incorrect meter constant until it tested the meter on April 6, 2010.

i. Subsequent to its test of meter number 141362866 on October 25, 2007, Commonwealth Edison did not test the meter again until April 6, 2010.

In addition, ComEd admitted the following facts and genuineness of documents in its Response to the Motion to Deem Admitted:

j. ComEd's September 20, 2010 Disconnection Notice to LAZ Parking (the "Disconnection Notice"), which is also Exhibit C to the Complaint) is genuine.

k. The letter dated October 28, 2010 from Ms. V. Williams-Anderson of ComEd to LAZ Parking, which is also Exhibit D to the Complaint) is genuine.

l. ComEd's claim of $36,625.07 represented ComEd's alleged delivery services charges.

m. Exhibit LAZ Req. 1.9, attached to LAZ's Requests to Admit (a ComEd screen shot provided by ComEd as page 99 of ComEd's responses to LAZ's First Set of Data Requests) is genuine.

n. ComEd installed meter number 141362866 at the Account's service location of 25 North Michigan Avenue, Chicago, on December 14, 2007.

o. Exhibit LAZ Req 1.12 attached to the Motion to Deem Admitted (Individual Order Completion Data Report provided by ComEd) is genuine.

C. ComEd's Continual Re-Litigation of Its Rule 216 Judicial Admissions

From the moment LAZ filed its Motion to Deem Admitted in November 2012, despite having had the opportunity to fully brief the issues as well as several hours' worth of oral argument; despite a ruling by ALJ Benn adverse to ComEd; despite the opportunity to make a Motion for Reconsideration of that adverse ruling; and despite yet another adverse ruling on its Motion for Reconsideration; ComEd has never ceased to litigate and re-litigate its Rule 216 judicial admissions, often with arguments almost word for word the same as those already rejected. For ComEd, no paper filed in this docket is too insignificant to include, one more time, all of the arguments that have been heard and determined in this case years ago.

With two orders adverse to its Rule 216 arguments already entered in this docket, ComEd's Rule 216 admissions are facts withdrawn from contention, and those orders are the law of this case. ComEd can hardly claim to be unfamiliar with the issues raised by its repetitive re-litigation of settled issues. *E.g., People ex rel. Madigan v Illinois Commerce Commission*, 1012 Ill. App. 2d 100024, 967 N.E.2d 863, 871 (2nd Dist. 2012) (the law of the case doctrine generally bars re-litigation of an issue previously decided in the same case). ComEd redoubled its efforts to re-litigate Rule 216 issues to take advantage of the Commission's substitution of ALJ Hilliard for ALJ Benn, who had entered the original order and the order on ComEd's motion for reconsideration. ComEd's behavior in this case is demonstrable bad faith, and its persistence in offering the same arguments evidences nothing less than an intent to harass LAZ and unnecessarily increase the cost of litigation. ComEd's apparent belief that constant repetition of baseless assertions on its Rule 216 admissions will lead someone to finally believe them. ComEd's behavior compels LAZ to respond, once again.

1. Illinois Supreme Court Rule 216

Rule 216[1] provides, in relevant part, as follows:

> Rule 216. Admission of Fact or of Genuineness of Documents
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> ...
>
> (c) *Admission in the Absence of Denial*. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, **within 28 days after service thereof**, **the party to whom the request is directed** serves upon the party requesting the admission **either** (1) **a sworn statement denying specifically the matters of which admission is requested** or setting forth in detail the reasons why he cannot truthfully admit or deny those matters **or** (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission. If good faith requires that a party deny only a part, or requires qualification, of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. Any objection to a request or to an answer shall be heard by the court upon prompt notice and motion of the party making the request.
>
> (Emphasis added.)

The purpose of Rule 216 is to establish material facts through a procedure that allows for a more streamlined and efficient case where disputed issues may be clearly and succinctly presented. *Z Financial, LLC v. ALSJ, Inc.(In re County Treasurer)*, 2012 Ill. App. LEXIS 683, 14-15 (1st Dist. 2012). Requests for admission serve the vital purposes of reducing trial time and conserving scarce judicial resources by facilitating proof with respect to issues in the case. Requests for admission are expressly within the definition of "discovery methods" authorized by the Illinois Supreme Court. Ill. S. Ct. Rule 201(a). *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, at 347 (2007) (holding that requests to admit constitute discovery).

"Unless the party to whom a notice to admit is directed conforms his response to the framework provided by Rule [216], each of the matters of fact and the genuineness of each document to which admission is requested, is admitted." *Banks v. United Insurance Co. of America*, 28 Ill. App. 3d 60, 63 (1st Dist. 1975); *Roth v. Carlisle Real Estate Limited Partnership VII*, 129 Ill. App. 3d 433, 437 (1st Dist.

[1]Prior to July 1, 2014 amendment; see II.C.6 below.

1984). Failure to respond properly to a request for an admission of fact constitutes a binding admission. *Hubeny v. Chairse*, 305 Ill. App. 3d 1038, 1043 (2nd Dist. 1999). None of ComEd's denials of LAZ's requests to admit were made pursuant to a sworn statement, and the remainder of ComEd's responses (apart from those responses admitting to the requested matter) purported to combine both objections and denials. Because ComEd's responses failed to comply with the fundamental requirements of Rule 216. LAZ moved for, and the ALJ granted, their admission. Rule 216 requires that a request be either answered or objected to, but a party may not both answer and object simultaneously to the same matter, as ComEd did. *City of Chicago ex rel. Schools v. Schorsch Realty Co.*, 95 Ill. App. 2d 264, 279-280 (1st Dist. 1968).

"The rules [the Supreme Court has] promulgated are not aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995). Failure to provide the sworn statement of a party purporting to deny a requested admission within the required 28 days is fatal. *Z Financial, LLC v. ALSJ, Inc.(In re County Treasurer)*, 2012 Ill. App. LEXIS 683 (Ill. App. Ct. 1st Dist. 2012). An "unsworn response to [a party's] requests for admissions is plainly inadequate under Rule 216 and does not serve as a denial of any of the requested admissions. Accordingly, those facts set forth in [the party's] requests for admissions are deemed admitted. *Robbins v. Allstate Insurance Co.*, 362 Ill. App. 3d 540, 544 (2d Dist. 2005), *overruled on other grounds*, *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 352 (2007).

2. Rule 216 Applies to Commission Proceedings

ComEd also makes a meritless claim that Rule 216 does not apply in Commission proceedings. To the contrary, not only has the Commission in its Rules of Procedure expressly adopted the discovery tools available to litigants in civil actions in the Circuit Courts, the Commission has specified that those discovery tools are to be utilized in the manner contemplated by the Code of Civil Procedure and the Rules of the Supreme Court of Illinois. Commission Rule 200.360(c) provides as follows:

> In addition to depositions, and subject to the provisions of this Part, any party may utilize written interrogatories to other parties, requests for

> discovery or inspection of documents or property **and other discovery tools commonly utilized in civil actions in the Circuit Courts of the State of Illinois in the manner contemplated by the Code of Civil Procedure [735 ILCS 5] and the Rules of the Supreme Court of Illinois [S. Ct. Rules].**

(Emphasis added.)

ComEd completely fails to grapple with this plain, blunt and direct language.

3. LAZ Met the Requirements of Commission Rule 200.350 and S. Ct. Rule 201(k) Prior to Serving Its Requests for Admission

LAZ Parking met the standard in S. Ct. Rule 201(k) by making a reasonable attempt to resolve discovery differences with ComEd prior to bringing the Motion to Deem Admitted (2/13/2014 Order, at pg. 2).

4. ComEd Waived Its Objections to LAZ's Rule 216 Requests to Admit in 2012.

ComEd's continued re-litigation of its Rule 216 judicial admissions is nothing more than an objection that LAZ Parking's Requests for Admission were "improper in whole," as provided in subsection (c)(2) of Rule 216. The time for raising such an objection passed back in 2012 with expiration of the 28-day period prescribed in Rule 216. ComEd provided answers to the Requests for Admission; it raised no procedural objection whatsoever to the Requests for Admission during the applicable 28-day period, and ComEd thereby waived any such objection as a matter of law. Rule 216(c)(2) expressly provides that if a party to whom a request for admission is directed objects on grounds that the request is improper in whole, it must raise those objections in its answer. If not, the party waives the objection. In *Banks v. United Insurance Co. of America* the Illinois Appellate Court stated:

> If there are grounds for objection, appropriate procedure under subsection (c)(2) of Rule 216 is to return written objections to the requesting party within the 28-day period permitted for reply. Since [plaintiff] failed to take such recourse, the plaintiff waived any otherwise valid objection to... the admissions requested in the notice.

28 Ill. App. 3d 60, at 63. ComEd raised no objections to or procedural concerns with LAZ's Requests for Admission until the Motion to Deem Admitted brought to its attention its utter failure to comply with the requirements of Rule 216.

5. ComEd's Complaints About the Integrity of the Factual Record are Deceptive and Meritless

ComEd usually clothes its complaints about Rule 216 in august language about the integrity of the factual record in this docket. These complaints are self-serving and hypocritical. LAZ served the requests to admit precisely because of ComEd's obstinate stonewalling on the resolution of discovery issues in 2012. ComEd uniformly ignored LAZ's repeated requests during summer and fall 2012 to confer by telephone on discovery issues. In its response to LAZ's Motion to Deem Admitted ComEd reprehensibly ascribed to LAZ Parking its own failure to fully comply with the Commission's discovery rules and policies regarding resolution of such issues. (*See* ComEd's Response in Opposition to LAZ Parking's Motion to Deem Certain Facts Admitted, December 14, 2012, at pg. 11). Only after LAZ Parking filed its Motion to Deem Admitted did ComEd deign to confer on discovery issues.[2]

6. The Illinois Supreme Court's 2014 Amendment of Rule 216(c) Changes Nothing Regarding ComEd's Judicial Admissions.

ComEd tries to cure its self-inflicted Rule 216 wound from by noting that the Illinois Supreme Court amended the rule in May 2014, which amendment became effective on July 1, 2014; ComEd then interprets the text of that amendment as a retroactive cure of its flawed responses of 2012. This is nonsense.

a. The Illinois Supreme Court's 2014 Amendment of Rule 216 Did Not Overrule Schorsch Realty

The 2014 amendment to Rule 216(c) in question states as follows:

> The response to the request, sworn statement of denial, or written objection, shall be served on all parties entitled to notice.

No other changes were made to the text of Rule 216. As stated above, the reason why ComEd's objections did not conform to Rule 216 is that ComEd purported to combine objections and denials in its responses. If the Illinois Supreme Court had meant to overrule *City of Chicago ex rel. Schools v. Schorsch Realty Co.*, 95 Ill. App. 2d 264, 279-280 (1st Dist. 1968), cited above in connection with the prohibition on combining objections and denials, then it would have expressly cited either that

[2] A telephone conference with ComEd's counsel was finally held on November 16, 2012.

case or others like it in the related comments and said it was overruling it, just as it mentioned *Vision Point of Sale, Inc. v Haas*, 226 Ill. 2d 334 (2007) in comments relating to amendments to subsections (f) and (g) of Rule 216. All the 2014 amendment does is require the party on whom the requests for admission have been served to serve its responses on all parties entitled to notice. This additional service requirement does nothing that would affect any combined objection/denial that ComEd made.

b. The Amendment to Rule 216(c) is Not Retroactive

Any argument that the 2014 amendment to Rule 216(c) is retroactive is equally nonsensical. The Court's own comments to the amendment state that it became effective on July 1, 2014. LAZ served its requests to admit on ComEd in October 2012. ComEd responded in October 2012. LAZ made its Motion to Deem Admitted in November 2012. The ALJ granted LAZ's motion in February 2014. If, as ComEd claims, this amendment were retroactive, nothing would change in this case because the responses were, in fact, served on all parties entitled to notice: LAZ Parking. After all, ComEd and LAZ Parking are the only parties to this case. Requests to admit are discovery tools, and under Comm. Rule 200.335(c), discovery is not served on the ALJ. But while nothing would change in this case, retroactivity would undoubtedly wreak havoc in many cases in the circuit courts because it would raise a question as to the validity of all previously served responses to requests to admit. A moment's thought on these consequences suffices to show how ludicrous is ComEd's claim of retroactivity for the July 1, 2014 amendment to S. Ct. Rule 216.

7. ComEd's Claim for $36,625.07 Relates to Unbilled Service Prior to the Two-Year Recovery Period Provided in Commission Regulation 280.100

ComEd insists that the "real facts" should be in the record, particularly with regard to $36,625.07 in charges that were the subject of the September 20, 2010 Disconnection Notice. Regardless of what ComEd claims, the matter of the $36,625.07 is a judicial admission; ComEd may not contest it (though it has repeatedly done so), nor may the Commission make a finding of fact contrary to it.

In support of its argument concerning the $36,625.07, ComEd cites in its Initial Brief the case of *Ellis v. American Family Mut. Insurance Co.*, 322 Ill. App. 3d 1006 (4th Dist. 2001) (ComEd

Brief, pg. 28). Either ComEd is unable to read and construe a reported judicial decision or it is engaged in an effort to perpetrate a fraud on this tribunal.

Ellis concerned the death of a young man in an accident that occurred while he was driving his mother's car. 322 Ill. App. 3d at 1008. The mother's insurer denied coverage on grounds that the son was not an "insured person" within the meaning of the policy because the mother had stated in response to a Rule 216 request for admission that her son owned his own car at the time of the accident. 322 Ill. App. 3d at 1009. During her discovery deposition, the mother contradicted her Rule 216 response when she stated that the son was driving her car because he did not have his own car at the time. 322 Ill. App. 3d at 1009-10. While her statement that her son didn't own a car at the relevant time was true, the court refused to allow that testimony to overturn the answer she gave in her response to the Rule 216 request for admission, and it affirmed the lower court's decision in favor of the insurer. 322 Ill. App. 3d at 1010. Thus, while ComEd cites *Ellis* in support of its position, the case actually supports LAZ's position.

The $36,625.07 can be viewed as a discovery sanction for ComEd's refusal to respond to LAZ's repeated requests to confer on problems with discovery responses during the summer and fall of 2012. ComEd's attitude toward discovery is much like its attitude toward correct metering and customer billing: indifferent.

D. ComEd's Failure to Conduct Required Post-Installation Inspection or Testing

1. ComEd's Judicial Admissions Show That It Failed to Test Meter 141362866 Within 90 Days of Its Installation in December 2007

The record in this case shows that after the December 2007 installation, ComEd failed to perform any test or inspection of the Meter until April 2010. Because ComEd failed to perform the post-installation inspection required by Commission Regulation 410.155, Commission Regulation 410.200(h)(1) prohibits it from back-billing LAZ Parking.

ComEd claims that notwithstanding its failure to perform a post-installation inspection or test of the Meter, it should be allowed to back-bill LAZ Parking because no post-installation "inspection" of the Meter would have disclosed the error in this case. The record shows that this claim is flatly wrong because a proper post-installation "inspection" would have immediately disclosed the error

in this case. ComEd argues that an "inspection" is something less than a "test" of a meter. ComEd's argument is meritless because, in order to avoid having to refund money to LAZ Parking, it must define the term "inspection" (which is not defined in the Commission Regulations) so narrowly as to entirely defeat the fundamental purpose of the Commission Regulations governing meter accuracy and testing.

Even assuming that ComEd's interpretation of the term "inspection" is correct, it admitted that if it had done the required post-installation testing of the Meter to confirm the billing multipliers that were (or were supposed to be) recorded in its Customer Information Management System ("CIMS"), the error that caused the back-bill in this case would have been discovered, and any back-bill would have covered only 90 days of service at most.

2. A Post-Installation Inspection or Test Would Have Immediately Disclosed the Error at Issue in This Case.

LAZ witness Bernhardt testified that had ComEd done either an "inspection" or "test" of LAZ's meter, that would have disclosed immediately a major discrepancy between the measurement of LAZ Parking's actual electricity usage as reported by 141362866 and a properly used portable standard testing meter. (LAZ Exh. 2.0:127-13). Mr. Rumsey, ComEd's expert witness on metering issues, even agreed on cross examination that if a ComEd meter technician had "inspected" the meter at LAZ's service location – even in the superficial manner that ComEd deems a sufficient meter "inspection" – they would have immediately seen that the billing multiplier used in CIMS was incorrect given the CT's used as part of LAZ's metering installation. (Tr. 368:5-22).

III. LAZ PARKING'S POSITION

A. Application of Commission Regulations Part 410 Generally, and Commission Regulation 410.200(h) In Particular

The meter accuracy and testing requirements of Part 410 are not optional for electric utilities. They are mandatory.

ComEd cleverly but speciously argues that Part 410, and in particular the sanctions prescribed by Commission Regulation 410.200(h) only apply if there has already been a test of the

customer's meter that shows it to have an error of more than plus or minus 2.0%. (ComEd Init. Brief, pg. 13). ComEd's position is ridiculous for several reasons.

Commission Regulation 410.200(h)(1) states as follows:

> Billing adjustments
>
> 1) For electric utilities. Any correction to metering data for over-registration shall be accompanied by an adjustment to customer billing by any electric utility that rendered service that is affected during the period of adjustment. Corrections made to metering data for under-registration may be accompanied by an adjustment to a customer's billing. However, **if an electric utility is providing metering service, in no case shall an adjustment to a customer's billing be made for under-registration if all testing and accuracy requirements of this Part have not been met.**

(Emphasis added.) It is interesting to compare the exacting precision with which ComEd attempts to parse the supposed distinction between "inspection" and "test" in Commission Regulation 410.155 (e.g., ComEd Init. Brief pgs. 17-19) with its aggressive inattention to the term "all testing and accuracy requirements of this Part [i.e., Part 410]" as used in Commission Regulation 410.200(h)(1).

From an *ex ante* viewpoint, nothing in either Commission Regulation 410.200 or any other term, section or provision of Part 410 makes its application contingent on the electric utility's having previously performed a test of the customer's meter that showed an error outside the 98%-102% range permitted by Commission Regulations. (Comm. Reg. 410.150). Quite to the contrary, Commission Regulation 410.120(c) would prohibit ComEd from installing such a meter. Under ComEd's logic, it would be subject to a sanction only if, after testing a meter and finding that it did not meet the accuracy standards, it installed it anyway.

ComEd's position is equally ridiculous from an *ex post* viewpoint. Commission Regulation 410.200(h)(1) is clear that its sanction of prohibiting any bill adjustment applies if any testing and accuracy requirement of Part 410 has not been met. The testing and accuracy requirements of Part 410 include both pre-installation testing (Commission Regulation 410.160) and post-installation testing (Commission Regulation 410.155). Under ComEd's reading of Part 410 in general, and

Commission Regulation 410.200(h)(1) in particular, if ComEd fails to do any of the testing required by Part 410, it can't be sanctioned under 410.200(h)(1) because there was no test that showed the meter to be outside the 98%-102% accuracy tolerance. ComEd's interpretation turns the accuracy and testing requirements of Part 410 in a regulatory bad joke: the sanctions for its failure to test a meter under Part 410 don't apply if it has failed to test the meter.

There is nothing unclear or unambiguous in Commission Regulation 410.200(h). All testing and accuracy requirements means all of them, including post-installation testing and inspection under Commission Regulation 410.155. The meaning of this section, and the sanction of Commission Regulation 410.200(h)(1) reflect, on their face, the basic purpose of these accuracy and testing requirements, which is to prevent exactly the type of problem that arose in this case due to ComEd's failure to perform a post-installation test or inspection.

B. Meter Accuracy "Inspection" v Meter Accuracy "Test"

One of the disputed issues in this case is whether a meter accuracy "inspection" is different from a meter accuracy "test." Neither term is defined in Part 410 of the Commission Regulations.

The only evidence that ComEd offers for its definition is the testimony of its witness Mr. Rumsey. ComEd witness Rumsey claimed that the ICC and ComEd came to some sort of deal at some indeterminate point in the past that commercial meters could be sample tested (Tr. 350:1-9), but ComEd provides not one iota of support for this assertion. In any event, Commission Regulation 410.180(a), discussed below, would contravene any such deal.

Just as ComEd labors to separate the "meter" from the customer's metering installation as an integrated whole, it labors even more strenuously to characterize inspection as a virtual drive-by performed by a ComEd technician to confirm only that the CTs are properly connected and that power is flowing in the right direction. (Tr. 355:17-356:13; 377:9-12).

But ComEd ignores the express context in which the term "inspection" appears in Commission Regulation 410.155:

> ...a post-installation inspection shall be made **under load to determine if the meter is accurately measuring customer energy consumption.**

(Emphasis added.) Commission Regulation 410.155 does not say that the meter shall be "inspected" solely for the purpose of making sure instrument transformers are correctly connected and that the power is flowing forward, not backward. (E.g., Tr. 377:9-15). That definition of "inspection" is purely a ComEd invention. Rather, the purpose of the post-installation "inspection" is to determine whether the meter is accurately measuring the customer's energy consumption, and whether it is doing so "under load." LAZ witness Bernhardt's unrebutted testimony is that ComEd's "look-see" at the CT connections and the power flow direction are entirely inadequate to determine whether the meter is accurately measuring the customer's energy consumption. Furthermore, LAZ witness Bernhardt's testimony makes clear that "under load" at the customer's service location includes at minimum a test of the customer's meter under the customer's actual load in series with a portable standard; this is the only way to be sure that the testing is complete. (Tr. 278:20-279:1; 281:15-20; 313:1-7).

ComEd's goal, though, is to define "inspection" so narrowly as to defeat the entire purpose of the Commission's meter accuracy and testing regime and make any post-installation "inspection" a useless exercise that can tell the utility nothing about whether the customer's meter is accurately recording energy consumption. ComEd witness Rumsey sticks to a testing regime in which the meter is entirely isolated, and tested under a phantom load in the portable standard without reference to any billing multipliers that must be applied if the customer's metering installation (including instrument transformers) is to be considered as a whole. (Id.) Given ComEd's self-imposed constraints on its version of a post-installation test or inspection, there is no difficulty in seeing why ComEd takes the view that such a procedure would not have shown the error at issue in this case.

ComEd witness Rumsey never explains how he could determine that a meter was accurately measuring energy consumption without doing what he would call a test. (LAZ Exh. 3.0:146-52).

C. ComEd's Meter Inspection Regime Is So Deeply Flawed as to Be Useless

LAZ agrees that the meter testing procedure prescribed by ComEd witness Rumsey would not have shown the error at issue in this case, but that is because ComEd's testing and accuracy procedures are so deeply flawed as to be useless. (LAZ Exh. 3.0: 82-85). The accuracy testing or accuracy inspection recommended by LAZ witness Bernhardt can be done with portable testing equipment that is commonly available, so the error here is a direct result of ComEd's business decision not to employ such equipment. (LAZ Exh. 3.0:95-103; LAZ Exh 2.1). In fact, ComEd's testing and accuracy procedures are worse than useless because they prevent ComEd from discovering problems with a customer's metering installation. (LAZ Exh. 3.0:114-19).

Across the electric utility industry, portable standards are commonly used to prove that the meter and all its related equipment is working correctly. Good utility practice would be to properly coordinate data from the metering installation with the utility's billing system. (Tr. 245:1-4). The record in this case shows that ComEd doesn't do that. It just checks to see if the CT wiring is correct and whether power is flowing forward, not backward. ComEd puts its faith (and the customer's money) on batch testing and the meter manufacturer's representation that the meter is accurate. That's good enough for ComEd to conclude that the meter is accurately registering usage. (ComEd Exh. 1.0:170-76). For ComEd, any post-installation inspection is a waste of time. (ComEd Exh. 1.0:184-86).

To the contrary, LAZ witness Bernhardt testified that it is impossible to achieve the goal of Commission Regulation 410.155 without performing what Mr. Rumsey would call a test of the meter. (Tr. 325:14-19). Mr. Rumsey's "inspection" procedure undermines the entire goal of meter testing under load, which is to ensure that the metering installation, functioning as an integrated whole, will yield an accurate bill to the customer. (LAZ Exh. 2.0:408-11).

Batch testing of commercial meters intended for use in transformer-rated installations with large customers is neither adequate nor proper. (Tr. 315:3-17). Commission Regulation 410.180(a) provides that batch testing is to be used "to sample test non-demand, self-contained single phase or three-wire network meters." 141362866 is a transformer-rated meter, not a self-contained meter.

D. LAZ is Not Engaged in Rulemaking

Contrary to ComEd's assertions, none of the testing and accuracy measures recommended by LAZ witness Bernhardt amount to rulemaking, or even remotely approach it. LAZ has proposed no changes to any of the Commission Regulations on meter testing and accuracy. Indeed, it's difficult to believe that ComEd is arguing that LAZ is engaged in rulemaking when it has allowed Mr. Rumsey, its Meter Mechanic Special, to define for ComEd and all of its larger customers what is meant by a post-installation inspection intended to ensure that transformer-rated meters are accurately measuring customer usage, and to view metering as an end in itself unrelated to billing. If LAZ's proposal amounts to rulemaking, then ComEd's pronouncements on what the Commission Regulations in Part 410 mean is no less so. ComEd's procedures turn Commission Regulation 410.155 into a dead letter, since any additional meter accuracy protections intended for large customers with transformer-rated metering installations amount to virtually nothing.

E. "Meter Error" vs "Billing Error"

ComEd's judicial admission that 141362866 was programmed with the wrong constant is, by itself, sufficient grounds to establish that, even in the teeth of ComEd's effort to distinguish "meter errors" from "billing errors," a meter error occurred in this case.

ComEd's claim that this case involves only a "billing error" rather than a "meter error" is wrong and, ultimately, irrelevant. As LAZ Parking witness Bernhardt made clear, ComEd's claim that there is no connection between billing and meter accuracy is preposterous. (LAZ Parking Exh. 3.0:270-271). The fundamental purpose of all utility metering is to bill the customer accurately and correctly.

ComEd bases its claim on its characterization of where billing multipliers "reside." But the record in this case shows that ComEd itself doesn't even know where it stores these numbers. ComEd has no one place where billing multipliers are stored: these factors, essential for accurately billing customers for usage could be in CIMS, or they could be in ComEd's mobile data or dispatch terminal, and its location could depend on who is looking for the number. (Tr. 370:1-371:17); what's

worse, the billing multipliers could even migrate in some unexplained way from the database to which the meter technician has access. (Tr. 387:17-18).

As LAZ Parking witness Bernhardt made clear, the question of whether a constant or billing multiplier "resides" in the meter or "resides" in the billing system is irrelevant because regardless of where ComEd ultimately puts it (or finds it), it doesn't alter the fact that the number in question is needed to determine the actual usage of the meter under test. (LAZ Parking Exh. 2.0:132-137, 429-439; LAZ Parking Exh. 3.0:282-288). Not only has ComEd never rebutted Mr. Bernhardt's position, ComEd witness Rumsey even agrees with it. (ComEd Exh. 1.0:139-140) (CT ratio is one of the billing multipliers need to obtain actual usage).

ComEd witness Spitz's testimony inadvertently discloses the baselessness of ComEd's supposed distinction between "billing error" and "meter error": Ms. Spitz testified that the meter discrepancy report from which ComEd first discovered that there might be a problem with 141362866 showed differences between the "constant CIMS would expect to use" and the "constant actually in use." (ComEd Exh. 3.0:69-71). Obviously, the constant that "CIMS would expect to use" has to come from somewhere, and that somewhere can be no place other than the customer's metering installation. Using ComEd's own logic, if the Commission ever has to determine a "residence address" of the correct billing multipliers for a particular meter, that would be the actual metering installation, not CIMS.

The Commission should also take judicial notice of ComEd's pleadings in a similar docket, *Amcor Flexibles, Inc. v Commonwealth Edison Company*, Ill. C.C. Dkt. No. 11-0033. That docket concerns scaling factors that were programmed into the virtual disk in a solid state meter, but there as well ComEd takes the position that the meter's incorrect scaling factor is a "billing error" and not a "meter error." (*See, e.g.*, Respondent's [i.e., ComEd's] October 19, 2012 Response in Opposition to Complainant's Motion for Judgment and in Support of Cross-Motion for Judgment in Favor of the Respondent[3]).ComEd has taken the same position in the pending appeal of that case. (See, e.g., Brief of Respondent-Appellee Commonwealth Edison Company, at pgs. 31-41, in *Amcor Flexibles*

[3] Available at: https://www.icc.illinois.gov/docket/files.aspx?no=11-0033&docId=188899

v. Illinois Commerce Commission and Commonwealth Edison Company, Ill. App. Court (1st Dist.) Case No. 1-15-2985). Apparently in ComEd's world there are only billing errors, and meter errors never occur. The reason is clear: given the glaring deficiencies in ComEd's compliance with Part 410 of the Commission Regulations, their only hope of avoiding the sanction of Section 410.200(h)(1) is to characterize every error as a billing error.

F. Meter v Metering Installation

ComEd's attempt to isolate the meter from the rest of the customer's metering installation is just a tactic aimed at showing that, because the CT's are not physically parts of the meter, no post-installation inspection or test of the meter would have revealed the error at issue in this case.

But ComEd's own tariffs give the lie to this argument because there ComEd uses the term "metering installation" over 150 times. (E.g., Ill. C.C. No. 10, 7th Rev. Sheet No 22; 5th Rev. Sheet No. 32; 9th Rev. Sheet No. 40; 2nd Rev. Sheet No. 41; and *passim*).

LAZ Parking witness Bernhardt made clear that a test of a meter has to include the meter plus its related auxiliary equipment, such as CTs. (Tr. 241:22-242:6). CTs are integral to the meter itself and to the measurement of the customer's actual energy consumption. (Tr. 244:15-245:4; Tr. 265:14-20; LAZ Parking Exh. 3.0:183-186). LAZ witness Bernhardt made it clear that the intent of Commission Regulation 410.155 is to include all of the devices auxiliary to the meter, such as CTs, as part of any test or inspection, because all of that equipment must be integrated with the meter in order to measure the customer's energy consumption. (Tr. 241:20-242:6). The meter depends on auxiliary equipment, like CTs, to make sure the meter gets the right numbers for the customer's usage. (Tr. 244:15-20).

LAZ witness Bernhardt made clear that it is not sufficient just to make sure that the CTs are installed correctly; the utility's field technician must make sure that whatever billing multipliers are derived from the metering installation are correct and are appropriately relayed to the utility's billing department, otherwise, the utility can't have accurate billing. (LAZ Exh. 2.0:149-50; LAZ Exh. 3.0:183-86; Tr. 244:21-245:1). ComEd's refusal to recognize the CTs as an integral part of the

customer's metering installation to be tested or inspected for accuracy along with the meter leads directly to a failure by ComEd to bill accurately. (Tr. 336:7-10).

G. A Proper Post-Installation Test or Inspection of 141362866 in Series Would Have Immediately Shown the Problem at Issue in This Case

ComEd witness Rumsey agreed that a field inspection, even the watered-down version of an inspection offered by ComEd , would have disclosed the problem at issue in this case. (Tr. 368:5-22).

LAZ witness Bernhardt made clear that several tests are needed to ensure that a customer's metering installation is accurately measuring energy usage. (Tr. 256:17-19). ComEd, according to its witness Mr. Rumsey, not only limits itself to just one type of test, the one test it claims to do only tests the meter in isolation from the customer's load. (Tr. 259:1-4). Because of this, any portable standard used in a ComEd test will never measure whether the customer meter is accurately registering the actual, full load of any customer whose metering installation employs CTs. (Tr. 264:3-11; 265:11-13). Furthermore, the additional tests that LAZ witness Bernhardt recommends would require only a few additional minutes. (Tr. 266:22-267:4).

As shown in LAZ Exh 3.1, the meter under test would be connected in series with a portable standard. (LAZ Exh. 2.0:360-62). When the meter under test is in series with the portable standard, the utility technician would still have to apply all the same billing multipliers to get the usage from the the meter under test and compare it to the results shown by the portable standard. (LAZ Exh. 3.0:146-52).

The evidence also shows that even if ComEd's cursory post-installation inspection were done, the CT ratio would have been visually confirmed. According to ComEd, there is no way to know what size CT will be used at any particular customer service location. (ComEd Amended Motion to Dismiss, April 30, 2015, pg. 6). CT specifics are confirmed on meter installation and allegedly entered into ComEd's system. (Id.). ComEd witness Rumsey agreed that the outside of the CT cabinet would have been marked with the CT ratio, so even a post-installation visual check of that external surface would have been sufficient to indicate a difference between the CT ratio as

indicated at the service location and the CT ratio being used in ComEd's billing system. (Tr.361:15-362:9). To the extent ComEd argues that its field meter technicians wouldn't have billing system information, that discloses an even deeper flaw in ComEd's meter accuracy and testing regime. As LAZ witness Bernhardt pointed out, ComEd does not affirmatively undertake to give its own billing department a definite confirmation of all the technical information that is essential to a correct customer billing process. (LAZ Exh. 3.0: 75-81).

IV. CONCLUSIONS

A. Formal Complaint

1. Count II

Because ComEd failed to comply with all of the testing and accuracy requirements of Part 410 of the Commission Regulations the Commission should grant judgment in favor of LAZ on Count II of the Formal Complaint and order ComEd to refund $259,937.85 under Commission Regulation 410.200(h)(1).

2. Count V

Under the judicial admissions stated earlier, ComEd's bill for $36,625.07 represents delivery services charges for periods prior to the two-year recovery period allowed by Commission Regulation 280.100, and therefore the Commission should grant judgment in favor of LAZ on Count V of the Formal Complaint and order ComEd to refund such moneys to LAZ.

B. Pending Motions

As of the time of filing of this Position Statement, LAZ has several motions pending:

Motion in Limine of March 4, 2016;

Second Motion in Limine of March 11, 2016; and

Motion to Strike Portions of ComEd's Response to First Motion in Limine.

For the reasons discussed above concerning ComEd's continual re-litigation of its Rule 216 admissions, the Commission should rule in favor of LAZ on each of such motions.

Dated this 20th day of May, 2016

By /s/ ***Paul G. Neilan***

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